No. 2455

IN

The United States Circuit Court of Appeals

Ninth Circuit

N. COY
COMPLAINT

VS.

THE
TITLE GUARANTEE & TRUST COMPANY, a Corporation; J. THORBURN ROSS, GEORGE H. HILL, et al
DEFENDANTS

MULTNOMAH COUNTY, OREGON, et al,
Intervenors, Respondents
APPELLEES

R. S. HOWARD, Jr.,
Receiver of The Title Guarantee & Trust Company, Intervenor
APPELLANT

Brief of Appellees

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF OREGON

WALTER H. EVANS, District Attorney for Multnomah County, Oregon, and
ROBERT F. MAGUIRE, Deputy District Attorney,
For Appellees
WILLIAM C. BRISTOL,
For Appellant

A. E. KERN & CO., PRINTERS

No. 2455

IN

The United States Circuit Court of Appeals

for the Ninth Circuit

MULTNOMAH COUNTY, et al.,
Intervenors, Respondents, Appellees,

vs.

R. S. HOWARD, Jr.,
Receiver of The Title Guarantee & Trust Company,
Appellant,

In the main cause of
N. COY,
Complainant,

vs.

THE TITLE GUARANTEE & TRUST COMPANY, et al.,
Defendants.

BRIEF OF APPELLEES

BRIEF OF THE ARGUMENT.

(Rule 24, Sub. 2 (c.)

The important question involved in this appeal seems to be whether or not under the laws of the State of Oregon taxes assessed prior to the year 1913 upon the personal property of a corporation in the hands of a receiver constitute a claim which the receiver should be directed by the Court to pay from the assets of the corporation. Since the opinion of Mr. Justice Wolverton deciding this question affirmatively is copied in full in the record (pages 43-51 incl.) (Rep. 212 Fed. 520), the appellees do not deem it necessary in preparing this brief to do more than call the attention of the Court to the following authorities sustaining the decision thus rendered in the District Court.

> "A Court having in its charge, or under its control, a fund, or other property, upon which taxes are due, will, as the representative of the sovereignty direct them to be paid without raising any question of the means of enforcement by process, and before all other claims except judicial costs. Thus upon proper application and suitable proof a receiver will be ordered to satisfy a tax assessed against the property in his hands, and a like direction will be made in other cases where funds are held subject to the authority of the Court."
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> Cooley on Taxation (Third Edition) Vol. 2, Page 834.

"Taxes levied upon personal property in the hands of a receiver become a charge upon the estate, and are properly payable by the receiver as a part of the costs and expenses of the administration of the trust. And the fact that the taxes are assessed in the name of the insolvent over whom the receiver is appointed rather than in the name of the receiver, constitutes no objection against the validity of the tax, nor will it avail against the tax that there is no averment or proof that there are sufficient funds in the hands of the receiver to pay the tax in question." High on Receivers Fourth Edition) § 881a. (Citing Wiswall v. Kunz, 173 Ill. 110, 50 N. E. 184).

"As illustrating the exclusive character of the receivers' possess and the jealousy with which it is guarded by the Court, it is held that property in the possession of a receiver appointed by a Federal Court, as in the case of a receivership over a railway, while subject to taxation under the laws of the state in which it is situated, cannot be levied upon and sold by an officer of the state in satisfaction of unpaid taxes. The remedy of the officer in such case should be sought by intervention in the suit in which the receiver was appointed." High on Receivers (Fourth Edition), § 140a.

"Property in the hands of a receiver of any Court, either of a state or of the United States, is as much bound for the payment of taxes, state, county and municipal, as any other property. Generally a valid tax upon property of a corporation in the hands of a receiver con-

stitutes a claim upon its assets within the jurisdiction, superior to every other claim, except judicial costs. It is the duty of the Court not only to respect this paramount right, and to make no order for the distribution of assets **in custodia legis,** except in subordination thereto, but also to make such orders as will compel the receiver to discharge this obligation. The lien of the state for taxes does not rest upon net income alone, but upon all and every part of the property which may be in the hands of the receiver, and therefore, where application is made to the Court by the officers charged with the collection of taxes, for direction to the receiver to pay the same, the Court ought either to direct that the receiver sell a part of the property committed to his care, and thus realize a sum sufficient to pay this charge, or it should give such direction to the receiver as would enable him, without sale, to bring about a like result; and especially is this true where, under management of the receiver, the taxes due the state and counties have been permitted to accumulate and pass unpaid for several years. It is not necessary for the Court to await the end of the litigation, and until final decree, to order the tax paid." 34 Cyc. 346. (See also 23 A. & E. Encyc. of Law 1072).

Where the Federal Courts have appointed a receiver of the property of a judgment debtor in Missouri, and have ordered the property sold, and the receiver has been in possession thereof during the time when a levy might have been made thereon

for taxes on the personalty, the Court will direct the payment of such taxes out of the proceeds of the sale in preference to all other claims, though the sale was ordered to be made "subject to all liens for taxes," as taxes on personalty are not a lien thereon until levy under the tax bill, in Missouri.—George v. St. Louis Cable & W. R. Co. (C. C.) 44 Fed. 117.

Property in the hands of a receiver of a Federal Court is bound for the payment of state taxes in the same manner as any other property, but when a receiver believes a tax to be invalid it is his right and duty to apply to the Court appointing him for protection.—Ex parte Chamberlain (C. C.) 55 Fed. 704.

The liability of a railroad company to taxation is not affected by the fact that the corporation is in the hands of a receiver, under chancery proceedings against it as an insolvent corporation. Such receiver takes and holds subject to all the liabilities of the corporation.—New Jersey Southern R. Co. v. Board of Railroad Com'rs., 41 N. J. Laws (12 Vroom) 235.

The fact that a corporation is in the hands of a receiver appointed by a decree of a Federal Court does not deprive the state of its right to a settlement for a tax imposed by law on its gross receipts. —Philadelphia & R. R. Co. v. Commonwealth, 104 Pa. 80.

Taxes accruing against the property of an insolvent railroad company constitute a preferred claim, and are entitled to be paid in full, including interest, penalties, and costs, before any other claims, except tthe judicial costs.—First Nat. Bank v. Ewing, 103 F. 195; 43 C. C. A. 150; Smith v. House, Id.; Galveston, H. & H. Ry. Co. v. Same, Id.; St. Charles Car Co. v. Same, Id.; Corbett v. Same, Id. (Citing Union Trust Co. v. Illinois M. Ry. Co., 117 U. S. 481, 29 L. Ed. 979).

A valid tax upon property of a corporation in the hands of a receiver constitutes a claim upon its assets within the jurisdiction, superior to every other claim except judicial costs. But this lien must be enforced by and under the sanction of the Court. —Ledoux v. La Bee, 83 F. 761.

A creditor of an insolvent corporation cannot complain of the act of its receiver in paying taxes out of the rents and profits, where they were subject to the deficiency arising on a sale of the premises under a mortgage which also included such rents and profits.—First Nat. Bank v. Illinois Steel Co., 51 N. E. 200, 174 Ill. 140, affirming judgment (1897) 72 Ill. App. 640.

Where property coming into the hands of a receiver is subject to a lien for taxes, for the enforcement of which no specific remedy is provided by statute, the Chancery Court, of which the receiver

is an officer, has jurisdiction, by reason of his possession of the property, to provide payment of the taxes, as a preferred claim, out of the proceeds of the property.—Duryee v. United States Credit-System Co., 37 A. 155, 55 N. J. Eq. 311.

Under 13 St. 99, authorizing the creation of national banks, and providing that nothing in the act is to exempt the real estate of such banks from either state, county, or municipal taxes, the interest and penalties accrued on delinquent taxes are as much a legal claim of the state as are the taxes, and orders for the distribution of assets in the hands of a receiver should be made in subordination to the paramount right of the state to such taxes, penalties and interest. Judgment, United States Nat. Bank v. Logan Co. (Sup. 1897) 51 P. 97, modified.—Gray v. Logan County, 54 P. 485, 7 Okl. 321.

Where land or other property is under the control of a court of equity in receivership proceedings, the payment of taxes must be secured through the authority of the Court.—Blackstone v. State, 83 A. 151, 117 Md. 237.

In this appeal counsel for the appellant seems to rely principally upon the case of United States v. Whitridge, 231 U. S. 144. A comparison of that case with the case at bar, however, discloses that the facts in the Whitridge case were altogether different from the facts involved in the case now under consideration. In the case at bar the appellees

are seeking to recover from the appellant taxes on **personal property.** The Whitridge case was a proceeding to recover from the receiver of an insolvent corporation the **corporation tax** provided for by the Corporation Tax Law of 1909. We quote as follows from the opinion rendered in that case:

> "As repeatedly pointed out by this Court, the Corporation Tax Law of 1909—enacted, as it was, after Congress had proposed to the Legislatures of the several states the adoption of the Sixteenth Amendment to the Constitution, but before the ratification of that Amendment—imposed an excise or privilege tax, and not in any sense a tax upon property or upon income merely as income. It was enacted in view of the decision of this Court in Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 158 U. S. 601, which held the income tax provisions of a previous law (Act of August 27, 1894, 28 Stat., c. 349, pp. 509, 553, §27, etc.) to be unconstitutional because amounting in effect to a direct tax upon property within the meaning of the Constitution and because not apportioned in the manner required by that instrument.
>
> "As was said in Flint v. Stone-Tracy Co., 220 U. S. 107, 145, respecting the act of August 5, 1909—'The tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof, in a sum equivalent to one

per centum upon the entire net income over and above $5,000 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described. As the latter organizations share many benefits of corporate organization it may be described generally as a tax upon the doing of business in a corporate capacity.' This interpretation was adhered to and made the basis of decision in Zonne v. Minneapolis Syndicate, 220 U. S. 187, and McCoach v. Minehill Railway Co., 228 U. S. 295, 300.

"A reference to the language of the act is sufficient to show that it does not in terms impose a tax upon corporate property or franchises as such, nor upon the income arising from the conduct of business unless it be carried on by the corporation. Nor does it in terms impose any duty upon the receivers of corporations or of corporate property, with respect to paying taxes upon the income arising from their management of the corporate assets, or with respect to making any return of such income.

"And we are unable to perceive that such receivers are within the spirit and purpose of the act, any more than they are within its letter. True, they may hold, for the time, all the franchises and property of the corporation, excepting its primary franchise of corporate ex-

> istence. In the present cases, the receivers were authorized and required to manage and operate the railroads and to discharge the public obligations of the corporations in this behalf. But they did this as officers of the court, and subject to the orders of the court; not as officers of the respective corporations, nor with the advantages that inhere in corporate organization as such. The possession and control of the receivers constituted, on the contrary, an ouster of corporate management and control, with the accompanying advantages and privileges." (U. S. v. Whitridge 231 U. S. Pages 148-149).

We submit that this decision in the Whitridge case, clearly emphasizing, as it does, the fact that the tax involved in that case, was not in any sense a tax upon property, does not in any manner tend to support the contention of the appellant in the case at bar.

Counsel for the appellant also cites the case of Marion County v. Woodburn Mercantile Co., 60th Oregon 367, 119 Pac. 487. That case, however, merely decides that when all the property of the person taxed is taken into another state, or disposed of, the tax collector will be left remediless in forcing collection. That principle has no application in the present case, since in this case assets of the corporation are still in the hands of the receiver and within the jurisdiction of the Court.

In conclusion we quote as follows from the decision in the case of Greeley v. The Provident Savings Bank, 98 Mo. 458:

> "The amount of the taxes was undisputed, and the receiver had in his hands funds sufficient to pay them, and we think the order should have been made. It may be conceded that the state did not have an express lien upon the assets that went into the hands of the receiver, but it had a right paramount to other creditors to be paid out of those assets (Acts, 1881, p. 180, Sec. 7; Ib. p. 35; State to use v. Rowse, 49 Mo. 586), a right which it could have enforced through its revenue officers by the summary process of distress (R. S. 1879, Sec. 6754) but for the fact that the property and assets of its debtor had passed into the custody of its courts; whose duty it was in the administration and distribution of those assets to respect that paramount right, upon the untrammelled exercise of which, depends the power to protect the very fund being distributed, and to maintain the existence of the tribunal engaged in distributing it, and to make no order for the distribution of assets in custodia legis except in subordination to that right."

It is submitted that the decision and order of the District Court should be affirmed.

Respectfully submitted,

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